COMMENTS ON CAPITAL PUNISHMENT AND CLEMENCY

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It is doubtful that the death sentence would produce much controversy if it were not for the power of clemency granted to the governors of most states and to the president in the United States, and in most civilized nations, to the ruling head. It has produced not only a great amount of criticism from lay people, but a substantial amount from members of the bar who do not favor clemency. Some members of the bar, who usually favor clemency for their clients, feel that it is an unnecessary invasion of the responsibilities of the judiciary when they are not involved.

It is almost axiomatic that if a man has been sentenced to death his execution produces very little in the way of post mortem controversy. Newspapers may carry a paragraph stating that: "John Doe paid his debt to society by being electrocuted in the Ohio State Penitentiary last evening." But should a condemned killer be successful in his plea for clemency, it then becomes news, and controversy rages on the front pages of many newspapers as well as in a flood of letters directed to the governor's office objecting to this abuse of his executive power.

Early in 1960, while considering an application for clemency on behalf of an individual sentenced to death, I received a letter from a member of the bar which said:

> I would suggest that the law giving the governor the right to prevent execution of those convicted under the laws of Ohio gives one man a power which is not proper and should be eliminated. This power has been misused in the past by "lame duck" governors for political purposes. The courts and not the governor have reviewed the evidence and certainly are the more qualified to rule on the question of clemency.

If we were to repeal those sections of the Constitution and those statutes which have been misused, I would venture to say that some of our greatest guarantees of freedom would be eliminated. I believe that the taking of a man's life is wrong. The state cannot properly contend that since killing is wrong it has the right to kill.

The classical argument against capital punishment is that it

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is not a deterrent; that it is a demeaning exercise of power by civilization. I want to emphasize that from my own personal experience those who were sentenced to death and appeared before me for clemency were mostly people who were without funds for a full and adequate defense, friendless, uneducated, and with mentalities that bordered on being defective.

Although I had personal convictions against the death penalty, I felt that since it was a part of the law of the State of Ohio I had to enforce it unless there were mitigating circumstances present. Consequently, in this article I would rather discuss the need for the clemency power for it was in the exercise of clemency that we found the most misunderstanding and the greatest controversy.

On Monday, April 18, 1960, in connection with granting a reprieve to Frank Poindexter I stated:

> We now find ourselves in the rather incongruous position where the ringleader, the instigator, the brains of the crime has been sentenced to life imprisonment and the dupe, the camp-follower, has been sentenced to death.
> Two philosophical questions haunt me at this time. Is it just that two men, one who pleaded guilty and one who was found guilty under the same set of facts should be treated differently? Is it in the best interests of justice and our democratic society that a man who avails himself of the constitutional right to a trial should receive a greater degree of punishment than the one who pleaded guilty to the same crime?
> These two questions then again cause me a problem of deciding whether or not the constitutional authority of granting clemency should be used to correct what, in my opinion, is an imbalance in justice.

It is certain that the right to grant clemency is not limited by law. Cummings and McFarland make a distinction between the due and impartial course of the law and the administration of justice.[1] In 1799, President John Adams had made the same distinction when he said that he did not feel that the two were the same since other factors do intervene which would not necessarily make justice synonymous with the law.

In support of the Pardon Provision of the then new Constitution, Alexander Hamilton said in the Federalist:

> Humanity and good policy conspired to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.[2]

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1 Cummings & McFarland, Federal Justice 48 (1937).

2 The Federalist No. 74, at 341 (Hallowell ed. 1842).

In *Ex parte Grossman*,[3] Chief Justice William Howard Taft made the following statement:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the Executive for special cases. To exercise it to the extent to destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.[4]

The pardoning authority has been referred to as a criminal court of equity. In proper cases individuals may seek relief from criminal judgments at law based on equitable considerations not available in courts of law.

Justice Oliver Wendell Holmes in the well-known case of *Biddle v. Perovich* made the following observation:

> We will not go into history, but we will say a word about the principles of pardon in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.[5]

In 1939, the Attorney General gave considerable attention to a study of pardon, parole, and clemency. In his conclusions the following statement appears:

> Emerging from the field of mere arbitrary caprice or semi-magical folklore, pardon has become an institution which is part of, and yet above, the legal system. It has never been crystalized into rigid rules. Rather, its function has been to break rules. It has been the safety valve by which harsh, unjust, or unpopular results of formal rules could be corrected. The almost wholly unrestricted scope of the power has been both its greatest weakness and its greatest strength. In the hands of arbitrary rulers exercising the power merely to indulge their personal whims, it has been subject to the most flagrant abuses. On the other hand, it has been the tool by which many of the most important reforms in the substantive criminal law have been introduced. Ancient law was much

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[3] 267 U. S. 87 (1924).

[4] *Id.* at 120.

[5] 274 U.S. 480, 486 (1926).

> more static and rigid than our own. As human judgment came to feel that a given legal rule, subjecting a person to punishment under certain circumstances, was unjust, almost the only available way to avoid the rule was by pardon.[6]

It appears that the need for the authority is clear. However, the method in which the authority is to be exercised is far from clear.

What are the precise grounds on which clemency should proceed? "It is easier to ask than to answer this question," said Governor Hill of New York.[7] The philosopher, Montesquieu, thought this "a point more easily felt than prescribed." [8]

A study of executive clemency in Wisconsin, conducted by J. L. Gillin, Professor Emeritus of Sociology at the University of Wisconsin, indicated that there was no established pattern by the various governors in the extension of clemency. However, of the 209 recommendations for commutation of sentence made by the Pardon Board in 1935 and 1937, 21% were made in order that the sentence in that particular case might be equalized with others committed for like crimes.[9]

In the case of *Ex parte Wells,* the Court stated:

> Without such a power of clemency to be exercised by some department or functionary of the government, it would be most imperfect and deficient in its political morality.[10]

The power to pardon is but the counterpart of the power to condemn. Justice, itself, demands that some means of correcting the errors of the law should be devised. In some rare cases, justice would demand mercy where the law condemns. However, there is at least one provision of constitutional limitation upon the power which is practically universal. This is a provision which requires that reasons for the pardon be given. Of course, this does not mean that the reason must be adequate, but it does mean that a reason, however trivial, must be assigned. Often the reasons for pardons have been absurd and ridiculous. An article in the Kentucky Law Journal tells of one governor remitting a death sentence because "hanging would do the man no good." Another pardoned a man guilty of larceny because "the defendant was about to be married." [11]

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[6] U.S. Dept. of Justice, 3 Attorney General's Survey of Release Procedures 295 (1918).

[7] 154 N. Am. Rev. 56 (1892), cited in Barnett, "The Grounds of Pardon," 6 Ore. L. Rev. 205, 206 (1927).

[8] Montesquieu, Spirit of the Law, bk. 6, ch. 21.

[9] Relevant excerpts from this study may be found in Gillin, Criminology & Penology 591 (3 ed. 1945).

[10] *Ex parte* Wells, 59 U.S. (18 How.) 307, 310 (1855).

[11] Stoke, "A Review of the Pardoning Power," 16 Ken. L. J. 34, 36 (1927).

To further point up the lack of pattern and procedures in the consideration of applications for clemency, Governor George Hoadley, of Ohio, more than seventy years ago told of the pressures brought to bear on him for pardons.

> As the work is now done, the pardoning business is carried on mainly by ear-wigging. At the Governor's Office, at his residence, on the streets, in the cars, at the theatre, in church, everywhere the work of solicitation proceeds.[12]

It was no doubt for this reason that the Ohio Weekly Law Bulletin, in 1913, carried a note entitled, "Pardoning Power."

> Certain it is that the pardoning power is thus shown to be a dangerous weapon which might at some future time be used in a manner detrimental to the best interests of the state. This power has probably been more freely exercised in the past few years than ever before. In fact, pardons were handed out in bunches over last Christmas day by the governors of several states, in many instances to life termers. We predict that in the near future the exercise of this power will be hedged about with limitations. And why should it not be? Upon the trial of a criminal case it is recognized that the State has rights to preserve, and when the jury has rendered a verdict in the preservation of those rights, why should another branch to the government have the power by a single stroke of a pen to set it at naught, for no reasons at all, or for reasons having nothing to do with the justice of the case.[13]

However, the need is well demonstrated by an article on pardon as an extraordinary remedy, written by Henry Weihofen of the University of Colorado:

> First of all, in answer to the argument of Beccaria that clemency should be shown through the laws, not through the executive, it is pointed out that a perfect system of legislation, which does exact justice in each case, is unattainable.
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> The practical situations which will arise, and to which the law must be applied, are so complex and indefinite in their variety that no human legislator can foresee all of the combinations of facts which future cases will involve, and draft a set of rules which will operate to accomplish the general end desired in all cases. In short, under the most carefully drafted legislative enactment there occasionally will be 'hard cases' in which the letter of the law was not intended to operate, and would violate the community sense of justice.[14]

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[12] Hoadley, The Pardoning Power 12 (1886) cited in U.S. Dept. of Justice, *op. cit. supra* note 6, at 156.

[13] 58 Weekly Law Bulletin 65 (1913).

[14] Weihofen, "Pardon as an Extraordinary Remedy," 12 Rocky Mt. L. Rev. 112, 113 (1940).

The same article continued:

> Historically, pardon has always been the broadest and least limited of powers. By its very nature, it could not be subjected to rules or restrictions. Its function was rather to break rules, wherever in the opinion of the pardoning authority mercy, clemency, justice or merely personal whim dictated. But this very unlimited scope of the power itself implied one limitation: it was intended as an ultimate, extraordinary remedy, designed to be used in cases where the ordinary legal remedies were not available. It was never intended to be used as a regular, ordinary release procedure. From time to time, pardons came to be granted as a matter of course for certain reasons, but when that became true, such reasons were soon made legally defenses, justifying a verdict of not guilty, and pardon became unnecessary.[15]

The possibility that the pardoning power might be abused is minimal as demonstrated by the careful approach by governors to the exercise of the authority.

Professor James D. Barnett, of the University of Oregon, indicated a substantial guarantee in the exercise of the authority in the following language:

> The spotlight of publicity is focused upon some parts of the government, illuminating those offices so brightly that the incumbent's every move is observable, but the brightness of the light thrown around the Governor's chair, for example, leaves the other offices in even darker obscurity. Hence, those acts not directly associated with the central and dramatic figure of the Governor are likely to be overlooked entirely by a public none too well educated in dealing with its officials.

This statement was made with the explanation that for every two or three criminals that we succeed in capturing, another is released. I would use it to illustrate that, although the power of clemency seems to be absolute by Constitution, the light thrown around the governor's chair is, in itself, a guarantee that the power and authority has not and would not be abused.

Professor Barnett goes on to say:

> One pardon granted by the Chief Executive of the State Capitol will attract more attention than a dozen releases made by an obscure and unknown board working in the shadows of the prison.

Al Smith once said:

> Most men grow in public office. If the exact effects of all the influences on a governor could be measured, it would be found that the power of reprieve, commutation and pardon adds, as the Bible says, the most cubits to his stature.

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[15] *Id.* at 114.

Governor Harriman, in an article appearing in the Saturday Evening Post, described it as follows:

> In some utopian age every punishment will fit every crime perfectly. Until then, the power of clemency will be needed to set aside the extreme penalty where the law is inflexible and to weigh factors that the judge and jury could not take into consideration.

What are the situations in which clemency may properly be used? Sometimes it is necessary to pursue justice through the combined effort of law and pardon. Sometimes technicalities of law produce a result which does not correspond to the feeling of justice of the people. For example, a principal in the second degree shares the legal fate of the real perpetrator. An aider and abettor is liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose.

The 1939 Attorney General's Survey of Release Procedures made the following conclusions, *inter alia,* as to instances in which clemency might very well be exercised:

> Technical violations leading to hard results. We have mentioned at least one example—where the legal "principal" in a crime may be only a comparatively innocent hireling, while the brains of the plot is legally guilty only as an accessory.[16]

> Applications for reprieve or commutation especially in death sentence cases. Here, too, liberalization of judicial procedure should permit reprieves to be granted by the courts. But while there is somewhat less logical reason for retaining this power in the executive than can be found [in other examples], this last recourse to the Governor in these cases is a benevolent power, which we shall probably want to retain and it will no doubt continue to be a major part of the pardoning power.[17]

Governor Chamberlain, of Oregon, discussed clemency in these words:

> The administration of justice is uneven. To illustrate: There are ten judicial districts in the state. A man may be convicted in one of a simple felony, and sentenced to a long term in the penitentiary; while in another, where the crime committed is the same and under almost identical circumstances, the prisoner may be given a very short term. It seems to me that it is a part of the duty of the executive branch of the government to equalize, where conditions warrant, this apparent inequality in the administration of justice.[18]

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[16] U.S. Dept. of Justice, *op. cit. supra* note 6, at 299.

[17] *Ibid.*

[18] Message of Governor G. E. Chamberlain, of Oregon, to the Twenty-fifth Legislative Assembly (1909) quoted in Barnett, *op. cit. supra* note 7, at 219.

In Ohio the governor's power of commutation is found in Section II, Article III of the Constitution. Here, too, the governors have frequently used the power of clemency to make the penalty imposed on the individual offender consistent with the penalty imposed upon other individual offenders.

For example, in the case of Rudy Ashbrook and William Tibbs in 1934 arising from a shooting in Cincinnati, each named the other as the triggerman. Ashbrook was tried shortly after his arrest; the jury found him guilty of murder in the first degree without mercy. A month later, Tibbs was tried. The jury found him guilty of murder in the first degree, but recommended mercy.

In April 1935, Governor Davey commuted the death sentence of Ashbrook, apparently because of (a) doubt as to whether Ashbrook was the triggerman, (b) the trial of Ashbrook was so soon after the crime was committed, (c) petition for mercy by eleven of the jurors, and (d) recommendation of the Parole Commission that sentence should be commuted.

Charles L. Ames and Julius Emrick in 1947 killed a Dayton police officer while in the process of attempting a burglary. Emrick, the triggerman, was tried. The jury found him guilty of murder in the first degree and recommended mercy. Thereafter Ames was convicted of murder in the first degree by a jury which failed to recommend mercy. In commuting the death sentence of Ames, Governor Thomas Herbert said:

> . . . in America, we pride ourselves on doing comparative justice . . . in view of the fact that the first jury recommended mercy with its verdict of first degree murder, thereby compelling a sentence of life imprisonment by the court, I am impelled to . . . commute the sentence of Ames to the same penalty . . . I am commuting Ames' sentence not from any sympathy for Ames, but in order that it may not be said that Ohio failed in comparative justice . . . .

A third instance: Cleo Eugene Peters and Michael G. Dumoulin, while engaged in robbing a Holmes County farmer and molesting his wife, killed the husband. Peters was the triggerman, but Dumoulin was very aggressive. Peters was tried and convicted of murder in the first degree without mercy by a jury. Thereafter Dumoulin was tried to a three-judge court which found him guilty of murder in the first degree with a recommendation of mercy. There was a belief in the community that Dumoulin was more or less the leader. Governor C. Wm. O'Neill, in commuting the death sentence indicated that, in part at least, comparative justice was the basis for his action when he noted that: "Under the law they were equally guilty."

One of the most publicized of all was the case of the gang led by Thomas Licavoli. Late in 1933 Sarafino Sinatra, alias Joe "Wop" English, was tried for the murder of one of the victims. The jury found him guilty of murder in the first degree without a recommendation of mercy. In the following term of court Thomas Licavoli, Sinatra, Jacob "Firetop" Sulkin, and ten others were jointly indicted on four counts of murder.

In November 1934, Thomas Licavoli, who apparently was not physically present at the scene of the homicides, was tried first. The jury found him guilty of murder in the first degree and recommended mercy. Sulkin was next tried and found guilty of first degree murder without a recommendation of mercy.

On January 10, 1935, Governor George White commuted the death sentence of English. On March 7, 1936, Governor Davey commuted the death sentence of Sulkin, because of the fact that Licavoli, who was undoubtedly the leader of the gang, received mercy at the hands of the jury. It is assumed that Governor White acted in the English case essentially on the same basis.

In many homicide cases involving more than one person, the fact that one was the triggerman is deemed sufficient to justify the imposition of a stronger sentence. But the law is clear that they are both equally guilty of the same offense if they are guilty at all.

In the case of *State v. Phillips*, the court, in its opinion, laid down this principle of law:

> . . . it is not material which of them be charged as principal in the first degree as having given the mortal blow; for the mortal injury given by any of those present is in contemplation of law the injury of each and every one of them.[19]

This seems to have been the feeling of Ohio governors in the above described commutations.

The difficulty of these cases is illustrated in two matters of clemency which faced Governor Frank Lausche. In the famous case involving Max Amerman, who coveted another man's wife and who influenced his young friend, Jerry Killinger, to kill the husband, Governor Lausche granted clemency to Killinger although Amerman was executed. Evidently Governor Lausche took into consideration the discrepancy in age between the two men and the fact that Amerman was the brains and the instigator, whereas Killinger was a hero-worshiping weakling.

Again, Governor Lausche was faced with a case in Licking County where two AWOL Marines killed an innocent driver while hitch-hiking. In spite of a unanimous recommendation by the

[19] State v. Phillips & Ross, 24 Mo. App. 475, 481 (1857).

Pardon and Parole Commission, the Governor did not stay the execution of Louis Angel, the triggerman, even though his accomplice, Harmon Cordray, escaped scot-free as a result of a jury verdict of acquittal. Cordray had no previous record; Angel had a juvenile record. The Pardon and Parole Commission felt that the question of comparative justice was raised by the acquittal of the accomplice. Many people urged clemency for Angel, but only the Governor knew the strain and the thought that went into making what has been referred to as the "awesome decision" in each case—one where he granted clemency, one where he denied it.

Custom and tradition, as well as justice, demand that the governor's particular concern in reviewing an application for clemency must be in making certain that ultimate justice is achieved.

In the words of Lord Bacon, "In cases of life and death, judges ought to (as far as the law permitteth) in justice remember mercy and to cast a severe eye upon the example, but a merciful eye upon the person."

We in Ohio require the unanimous agreement of twelve jurors in a death case. We feel that a death case should not be submitted to a single judge without a jury but that there should be three judges sitting on such an important matter. We are so concerned with reference to the delicacy of taking a man's life that in the case of the electrocution itself there are two switches and two guards acting simultaneously in order that neither will know who actually pulled the death lever.

The governor's role, however, is one in which there can be no transfer of responsibility. When he reviews an application for clemency he knows that this is the individual's last resort. This cannot be done in the secrecy of a jury room. He cannot salve his conscience by saying, "Maybe my switch did not cause the man to die."

If we take a man's freedom in error we might compensate for that mistake. If we take a man's life the damage is irreparable. Clemency is an essential part of our system of justice. It is for this reason alone, if for no other, that there be a more general recognition of its need, its purpose, and the difficulties incumbent with its administration.

It is because of the solitude in which he must make his decision that the governor's method of arriving at the result is not hampered by rules of evidence. He is free to secure information in whatever manner he feels will best serve the cause of ultimate justice. Whereas, testimony secured through the use of a polygraph is not admissible in a court of law, there is no restriction against a governor giving or refusing to give weight to such testimony in arriving at his decision.

This is also true with the use of sodium amytal. In fact, the Toledo Times in commenting on the fact that the governor was not restricted said that "if he saw fit he could use the reading of tea leaves in arriving at his decision." If the rules of evidence were to be as restrictive as is the case in the actual trial, it would be almost impossible to fulfill the purpose of the clemency provision described by Alexander Hamilton.

In addition, it might be argued that, in keeping with the fundamental provisions of our system of criminal justice, the presumption of innocence follows the accused not only through the judicial system, but also continues in the matter of clemency. Should the governor in considering an application for clemency be forced to divorce himself from the doubt of guilt?

As in the case of Edyth Klumpp, subsequent developments indicated that the jury which had found her guilty of first degree murder with the recommendation of mercy had been taken out to view a site at which the killing had *not* occurred; that the defendant at least had claimed she had not told the truth in the course of the trial; and that one of the principal witnesses for the prosecution had at least lied, if he had not committed perjury. Should the governor push all of this aside and say that the jury had received all of the facts? Is it possible that in our system of justice, where clemency is an essential part, that one who is charged with making a decision between life and death should conduct a routine review and affirm a sentence of death lightly, callously, and without compunction?

There is a great need for the understanding of the function and purpose of clemency. There is a greater need that it be administered as envisioned by those who established our system of law and justice as a basis for a democratic society.

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